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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

In re Marriage of MARY K. and JAMES
M. ODDINO.

MARY K. GLASSMAN,

Appellant,

v.

JAMES M. ODDINO,

Respondent;

RAYTHEON NON-BARGAINING
RETIREMENT PLAN,

Appellant.

G029087

(Super. Ct. No. 96D002191)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Richard O.
Frazee, Sr., Judge and Donald B. King, Referee. Affirmed.

Glasser and Smith and Robert Glasser for Appellant Mary K. Glassman.

Barry L. Friedman, Inc. and Barry L. Friedman for Respondent.

O'Melveny & Myers, Wayne S. Jacobsen and Larry A. Walraven for
Appellant Raytheon Non-Bargaining Retirement Plan.

Appellant Mary K. Glassman, formerly Mary K. Oddino (Mary) elected to receive a 60-month payout of her share of the retirement benefits of her former husband, James M. Oddino (James)¹, before he retired. After he retired, and after she had received the bulk of the monthly payments to which she was entitled, she sought an aggrandized share of retirement benefits, based on the fact that James had become entitled to an early retirement subsidy. She obtained a supplemental qualified domestic relations order that provides her with an increased share, but she contends that the share is incorrect, that she should have received more. She also challenges the attorney fee awards against her.

In the argument section of her opening brief, Mary makes assertions of error under 69 topic headings. Under many of those topic headings, Mary makes numerous separate arguments. In short, she complains the supplemental qualified domestic relations order is in error for a multitude of substantive reasons and that the record demonstrates a plethora of procedural errors leading up to the entry of the order and thereafter continuing with respect to posttrial orders. We disagree in all respects and affirm the orders. In addition, we remand the matter to the trial court for a determination of attorney fees and costs pursuant to Family Code section 271.

I

FACTS

This is a case with a troubled past — a very troubled past. It continues on its gnarled path, as we shall show.

James and Mary were married in the 1950's. James subsequently went to work for the Hughes Aircraft Company. The parties separated in 1981 and executed a marital settlement agreement in 1982. The judgment of dissolution was entered in 1983.

¹ Hereafter, we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475, fn. 1.)

James became eligible for retirement on April 1, 1988, his 55th birthday, but chose not to retire at that time. Mary did not want to wait until his eventual retirement to begin receiving her share of the retirement benefits, so the parties negotiated a modified QDRO that would enable the retirement plan to commence making payments to her. In 1989, the court entered a Stipulation and Order re Modification of Interlocutory Judgment and Qualified Domestic Relations Order (1989 QDRO), in which the parties agreed, and the court ordered, that Mary would receive 36.6231 percent of the retirement benefits, with payments “to be determined as if [James] had retired on April 1, 1988 and payments to [Mary] . . . to commence as of April 1, 1988” The stated percentage was equal to one-half of a fraction, the numerator of which was the number of days James had participated in the retirement plan to the date of separation and the denominator of which was the total number of days of James’s participation in the retirement plan to April 1, 1988.

The Hughes Non-Bargaining Retirement Plan (now known as the Raytheon Non-Bargaining Retirement Plan) (Plan) thereafter calculated the amount of the monthly benefit owing to Mary in a manner designed to provide an amount “‘equal in actuarial value’ to a benefit paid beginning on James’s 65th birthday,” even though he had not then attained age 65. (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 72 (*Oddino*).)

Mary believed the calculation was incorrect. In 1991, she filed an OSC re the payments from the Plan. She asserted that her benefit should be based on the “Rule of 75.” Under the terms of the pension plan, the “Rule of 75” provided that “an employee who retires at or after age 55, and the sum of whose age and years of service is at least 75, is entitled to a benefit calculated without actuarial reduction, i.e., an annuity in the same periodic amount as if he or she had retired at age 65.” (*Oddino, supra*, 16 Cal.4th at p. 72.) The trial court denied the relief Mary sought, holding, inter alia, that the “Rule of 75” was a subsidy, not an accrued benefit.

Mary challenged the order and was successful at the Court of Appeal. However, the Plan obtained review before the California Supreme Court, which reversed, in *Oddino, supra*, 16 Cal.4th 67. The California Supreme Court agreed that the benefits provided under the “Rule of 75” were actually an early retirement subsidy and that it was impermissible to calculate Mary’s benefit based on that subsidy before James had retired. (*Id.* at pp. 84, 87-88.)

However, the California Supreme Court also stated: “Nothing we say here, we note, precludes recalculation of Mary’s payments if James actually takes early retirement. Upon the participant’s retirement with subsidized early retirement benefits, ERISA does not prohibit modification of a previous order ‘so that the alternate payee also receives a share of the subsidized benefit.’ [Citation.] The Plan concedes the superior court retains jurisdiction to modify its QDRO, and expressly waives any objection to such a recalculation upon James’s early retirement.” (*Oddino, supra*, 16 Cal.4th at p. 88.)

Mary sought rehearing before the California Supreme Court, and when that failed, review before the United States Supreme Court. She also sought reconsideration of the United States Supreme Court’s denial of certiorari. That avenue also failed.

On October 1, 1994, James retired. In 2000, Mary filed an order to show cause for “perfection” of the QDRO. She sought an increased benefit payment, based in part on the enhanced benefits to which James became entitled on his early retirement. The parties stipulated to have the matter heard by retired Justice Donald B. King as referee. The matter proceeded accordingly.

As reflected in the statement of decision, the referee found that Mary’s claims in large part rehashed the claims she had made before the California Supreme Court in *Oddino, supra*, 16 Cal.4th 67. Thus, she was not entitled to much of the relief she sought. Pursuant to a supplemental domestic relations order (SDRO) filed on February 14, 2001, the court awarded Mary a 36.6231% share of the early retirement

benefit to which James became entitled on his early retirement in 1994. That share, including interest accumulations, came to \$150,038.32.

The court also awarded sizeable attorney fees and costs to the Plan and to James. The amount awarded to the Plan was reduced by an amount that, on a prior occasion, had been tentatively ordered paid to Mary by the Plan.

Mary filed a notice of appeal from the SDRO and various posttrial orders. The Plan filed a notice of cross-appeal from the portion of the SDRO imposing attorney fees on the Plan, by way of the reduction in fees ordered paid by Mary.

II

DISCUSSION

A. Introduction

This case was well described by the referee in the statement of decision: “Once the California Supreme Court issued its opinion in *Oddino* in 1997, this should have been a simple case. All that had to happen was to modify the 1989 QDRO to calculate the benefit that [Mary] was entitled to receive because [James] had taken early retirement, resulting in an additional benefit, part of which was community in nature. Instead, [Mary] (although it certainly appears to the Court that [her] current husband, Dr. Glassman, really was the driving force behind her actions in this case) pursued futile and frivolous litigation, made numerous misleading statements to this Court, misstated numerous facts in many pleadings and papers submitted to this Court, argued a twisted version of the holding of the California Supreme Court’s decision in *Oddino* (which in a letter to [James], Dr. Glassman characterized as ‘illegal, stupid, inane, irresponsible, and generally lawless’), and asserted in unbelievably lengthy, complicated and unwarranted volumes of paperwork virtually every possible or imaginable theory, often without citation or authority, and frequently with misleading or erroneous citation or authority.”

The referee continued: “The bulk of the Court’s time was consumed by reading [Mary’s] voluminous paperwork, which appears to the Court to have been authored to a great extent by Dr. Glassman acting as [Mary’s] attorney’s ‘paralegal’ and ‘expert’. For the most part, this litigation was pursued tenaciously with the assertion by [Mary] of untenable and unreasonable positions, and with absolutely no sense whatsoever of the proportionality of the cost-benefit ratio to [Mary].”²

The above-quoted language is only a portion of the referee’s description of Mary’s litigious propensities. After further discussion of the same, the referee continued with the following admonition: “This should be the end of this case, but [Mary] (probably more accurately, her husband, Dr. Glassman) has shown an unwillingness to accept any result other than one which Dr. Glassman believes is correct, even when the California Supreme Court has spoken on the subject. Although this Court believes that any appeal from this order would be a frivolous appeal, this Court nevertheless assumes that there will be an appeal, which will go all the way in the appellate process until the United States Supreme Court declines to accept the case. This is the history of this case, and history may well repeat itself.”

² The statement of decision describes some of Mary’s other litigation efforts, including an unsuccessful malpractice action against her former counsel in the dissolution proceedings and unsuccessful tax court litigation concerning deductions she took for attorney fees. She apparently appealed the latter matter to the Ninth Circuit Court of Appeals and thereafter sought certiorari in the United States Supreme Court. She did not stop there. As the record reflects, Mary filed an OSC for attorney fees and costs, seeking from the Plan attorney fees in the amount of \$2,012,763 plus costs, purportedly incurred in connection with the litigation of, inter alia: (a) the “Rule of 75” issue through *Oddino* and thereafter the petitions before the United States Supreme Court; (b) the malpractice action against her former counsel; and (c) the tax court litigation over the deductions she took for attorney fees incurred in battling the Plan.

Despite this admonition, Mary does indeed seem determined to have history repeat itself. She has filed a brief laden with dozens upon dozens of rapid-fire arguments with little analysis or citation to authority or the record.

B. Order for Reference and Scope of Referee's Jurisdiction

(1) Background

In her March 23, 2000, order to show cause for “perfection” of the QDRO Mary requested, inter alia, that the court issue a statement of decision in a form she proposed. In the alternative, she requested that the court refer the findings of fact to a referee pursuant to Code of Civil Procedure section 639. Ultimately, the parties signed an order for reference, designating retired Justice Donald B. King as the referee.

The “Order for Reference (CCP § 639)” (capitalization omitted) was filed on May 18, 2000. The order stated that the parties wished to refer the matter to a referee. The court ordered a reference and identified Donald B. King as the referee. The order stated: “4. The Referee shall report a Statement of Decision pursuant to CCP § 638 disposing of all issues raised by the parties in their memoranda and apportioning the costs of the reference including the Referee’s fee. [¶] 5. The Statement of Decision shall stand as the decision of the Court pursuant to CCP § 644 as if tried by the court. The decision may be excepted to and reviewed in like manner as if made by the court per CCP § 645.” The order was signed by counsel for Mary, James and the Plan, in addition to the judge.

There is an obvious error in the order. It describes the reference both as one under Code of Civil Procedure section 639, having to do with the appointment of a referee when the parties do not consent, and as one under Code of Civil Procedure section 638, having to do with an appointment upon the agreement of the parties.

At the initial hearing on the matter, Justice King addressed the inconsistency at the outset. He stated: “[T]here’s . . . at least one thing I thought might

be helpful to get resolved procedurally at the beginning. In the title of the Order of Reference it makes reference to CCP 639. The body of it makes reference to the referee reporting a statement of decision pursuant to CCP 638, and then it goes on to say that that shall stand as the decision of the Court as if tried by the Court. [¶] . . . [A]s I read the Order of Reference, it appears to me, although it certainly doesn't refer to the constitutional rule of court, that, in effect, what has been done is to — my role is really identical to that of Judge Pro Tem.” Mary’s counsel then stated: “That’s correct.” The Plan’s counsel also articulated agreement. Mary’s counsel then stated: “I suspect that the section number in the caption might be deemed an error.” Justice King then concluded the discussion by stating: “Well, the body would usually control anyway.”

(2) Argument

Mary now challenges Justice King’s authority and asserts that his order is void. She complains that she did not request a reference under Code of Civil Procedure section 638 in her OSC for “perfection” of the QDRO and that the stipulation and order is ambiguous or otherwise does not provide for the appointment of a Code of Civil Procedure section 638 referee. She also makes a myriad of other arguments attacking the appointment and authority of Justice King. However, Mary will be held to her written agreement for a reference and to her interpretation of that agreement as she expressed it on the record. She cannot be heard to complain on appeal. (*Sperber v. Robinson* (1994) 26 Cal.App.4th 736, 742-743.)

In her brief, Mary refers to Justice King as a “referee,” although she disputes whether he was a section 638 referee or a section 639 referee. At the same time, she complains that he failed to take an oath of office as a judge pro tem, and that this is another reason why his order was void. Justice King himself said at the hearing that the body of the order controls. This would mean that he was a section 638 referee, not a

section 639 referee. Mary does not cite legal authority addressing whether a section 638 referee must take an oath of office.

In addition, Mary asserts that the court was required to grant a hearing or trial on the referee's report, but she fails to cite to any portion of the record showing a request or denial of the same. By failing to cite to the record, her argument is waived. (*Schubert v. Reynolds* (2002) 95 Cal.App.4th 100, 109.³) Moreover, the case she cites, *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351, 369-370, is inapposite, inasmuch as it does not have to do with section 638 referees.

Next, Mary argues the entry of judgment and each of five posttrial referee orders was in excess of jurisdiction and void, and that when she contested the referee's report, it became advisory only. She makes a comment to the effect that entry of a judgment without judicial authority is void, but she fails to explain why the entry of judgment in this case was without authority, i.e., inconsistent with the order for reference. Where the posttrial orders and her contest of the report are concerned, she fails to make any citation to the record concerning them. Her arguments about these items are waived.

C. Statement of Decision

Mary makes several assertions of error with respect to the statement of decision. First, she contends that based on the dates of service of certain versions of the statement of decision and SDRO, she had no opportunity to object and that the documents do not reflect her objections to the drafts. Once again, she provides no citation to the record. Her arguments are waived.

³ Mary repeatedly fails to cite to the record or to authority. In each instance, her argument is waived. (*Schubert v. Reynolds, supra*, 95 Cal.App.4th at p. 109.) We will not provide a case citation in each subsequent location where we state her argument has been waived.

Mary also contends that the judgment is reversible per se because the statement of decision was incomplete. Mary says it did not address a plethora of items she identifies, such as her four motions to strike, etc. In support of her assertion that the referee failed to address the items, she cites to her own memorandum of points and authorities in support of her motion for a new trial. She has failed to cite to any portion of the record containing the items she contends were overlooked. Because of her failure to cite to relevant portions of the record, her argument is waived.

D. Errors in SDRO

(1) Application of Oddino

Mary claims the SDRO is void because it violates the instructions of the California Supreme Court in *Oddino, supra*, 16 Cal.4th 67. First, Mary says that the SDRO is erroneous because it calculated her increased share based on a retirement date of April 1, 1988, whereas “*Oddino* awarded [her] a share of the 10/1/94 ERB” *Oddino* did no such thing. In *Oddino*, the California Supreme Court stated that its ruling on the “Rule of 75” issue did not preclude recalculation of Mary’s payments if James took early retirement. (*Oddino, supra*, 16 Cal.4th at p. 88.) So, when James did take early retirement, Mary was at liberty to seek a recalculation, and she did so. *Oddino* did not address the manner in which that recalculation would be made. That matter was not before the court.

Similarly, Mary argues that it was error to deduct the actuarial value of the 55 payments she had already received. She again cites the California Supreme Court opinion in *Oddino*, stating the Court “ordered” that she “receives [*sic*] her share of the 10/1/94 ERB.” The opinion contains no such order and, once again, did not dictate the manner in which any recalculation would be made.

In addition, Mary attacks the interest rate applied to the amount owing to her. The SDRO provided that interest in the amount of \$18,575.45 would be paid through January 1, 2000 and that interest at the rate of 5 percent per annum would be paid on “\$150,038.32 from January 1, 2000 to the first day of the month preceding payment.” Mary says the 5 percent interest rate is incorrect. In support of her position, she cites a footnote in the *Oddino* opinion which states that section 1.6 of the retirement plan specifies the interest and mortality rates to be utilized in making actuarial reductions to be made to an alternate payee before the plan participant retires. (*Oddino, supra*, 16 Cal.4th at p. 87, fn. 12.) She does not explain why this same interest rate should be applied in the present context. She also fails to provide a record cite to section 1.6 of the plan, so we may ascertain exactly what that provision says about the interest rate to be applied.

Mary makes two other assertions with respect to the purported violation of the *Oddino* decision. The first is an unintelligible argument concerning a breach of fiduciary duty allegation. She fails to cite to the record in support of her point, so the argument is waived. The second is a challenge to the finding, as contained in the statement of decision, that her litigation was frivolous. She states that *Oddino* “required Mary to modify her QDRO to pay her recalculation.” (Capitalization omitted.) Once again, *Oddino* did no such thing. It permitted her to seek a recalculation; it did not require her to do so. More importantly, the fact that she decided to pursue the recalculation did not mean that the manner in which she pursued that litigation could not be held frivolous.

(2) *Legal theories enunciated in statement of decision*

Mary urges that the referee erroneously employed each of seven theories set forth in the statement of decision. She describes those theories as: (1) equitable considerations; (2) res judicata; (3) *Gillmore* claims; (4) equitable estoppel; (5) laches; (6) preemption and jurisdiction; (7) and “Perfected QDRO.”

(a) equitable considerations

In its first point, having to do with equitable considerations, the statement of decision provides that “the manner in which [Mary] has asserted her claims to the Oddino pension are in total disregard of the rights of [James], who after all is as entitled to his full share of the pension as [Mary] is entitled to her full share [citation].” Mary takes issue with this statement. Among other things, Mary claims that the *Oddino* opinion provides that she “has an unfettered right to her share of the 10/1/94 ERB.” She completes her argument by stating that the “[d]efinition of James’ remainder rights is not relevant.” (Capitalization omitted.) Again, *Oddino* did not dictate the manner in which the recalculation would be made. Moreover, we do not share Mary’s apparent viewpoint that a correct determination of James’s share is irrelevant. We agree with the statement of decision that the determination of each party’s share must be correct.

(b) res judicata

Mary makes two strange arguments as to why the referee erred in applying the doctrine of res judicata. First, she cites to a sentence out of the post-*Oddino* opinion of the Court of Appeal, Second Appellate District, Division One, in its decision on the malpractice action that Mary brought against the attorneys she hired in connection with the 1989 QDRO. (*Glassman v. Oyler* (Aug. 7, 1998, B104302) [non pub. opn.] (*Oyler*).) The court in that opinion stated in a footnote: “Whether Mary is entitled to payment of \$3,689.69 or some other fixed amount and, if so, when, remain to be finally determined.” (*Id.* at p. 15, fn. 10.) Irrespective of Mary’s interpretation of the significance of that sentence, Mary’s rights as established in *Oddino* have been finally determined. A comment out of an appellate court opinion in a legal malpractice action does not change that and does not demonstrate error in the referee’s conclusion that Mary was attempting to relitigate those rights.

Second, Mary says that “[the Plan] refused [her] request to make the recalculation from the 1992 Orders, denying the existence of the order.” This assertion is nonsensical and, in any event, Mary provides no citation to the record in support of it. Her argument is waived.

(c) Gillmore claims: abandonment, equitable estoppel and laches

Next, Mary complains that the referee said she had abandoned her *Gillmore* claims. (See *In re Marriage of Gillmore* (1981) 29 Cal.3d 418 (*Gillmore*).) She cites to a portion of the statement of decision which recites: “As is reflected in the Order filed herein on May 3, 1992 . . . , this Court . . . noted that pursuant to the stipulation of [Mary] and [James], [Mary] abandoned her *Gillmore* claims against [James].” Mary does not explain why this recital is incorrect. Moreover, she does not provide a record cite for either the order in question or the stipulation. Her argument is waived.

Mary also cites to the portion of the statement of decision in which the referee provides his legal analysis as to why *Gillmore* claims were abandoned. Yet she omits to provide argument as to why that analysis is in error. Her citations to *Oddino*, *Oyler*, and *In re Marriage of Crook* (1992) 2 Cal.App.4th 1606, 1611, are inapposite and unavailing.

Continuing her attack, Mary objects to the assertion that she lost her *Gillmore* rights when she accepted payments under the 1989 QDRO. Mary says that the Plan unilaterally made the payments over her objections and she had to cash the checks because she was paying taxes on them. Mary fails to understand the referee’s point. She stipulated to the 1989 QDRO, in which she agreed to begin receipt of payments from the Plan, paid as a specified percentage of benefits and calculated with reference to a stipulated retirement date. The fact that she later disputed the manner in which the Plan

calculated those benefits does not mean that she did not agree to receive payments directly from the Plan commencing in 1989.

Finally, Mary states that the statement of decision, in applying the doctrine of laches, “falsely” asserts that Mary waited until after James had retired before she requested *Gillmore* relief. As Mary correctly asserts, she demanded, in her 1991 OSC, that if she did not receive the requested relief against the Plan, that James be ordered to pay her the difference between the amount of monthly payments she thought she should receive and the amount she was actually receiving from the Plan. She relied on *Gillmore* in asserting her claim against James. However, the 1992 order denying her relief states: “Pursuant to the stipulation of [Mary] and [James], the Court did not rule on [Mary’s] request for relief against [James].” This shows that Mary had abandoned that *Gillmore* claim no later than 1992.

(d) preemption and jurisdiction

Mary states that “the referee refused to consider [the Plan’s] misconduct on the grounds that *Oddino* held that the court had no jurisdiction for a Title I claim.” She does not cite to the record concerning the assertions of Plan misconduct she contends the referee failed to address. She has waived her argument.

(e) “perfected QDRO”

Continuing her arguments, Mary challenges the portion of the statement of decision stating that: “According to the Plan, the payments which would be required under the [form of QDRO Mary had requested], when added to the payments already made to [Mary] under the 1989 QDRO and the payments made to [James] prior to [Mary’s] 1999 Notice of Adverse Interest, would exceed the total actuarial value of the aggregate benefits which would have been payable in the absence of a QDRO. The Plan’s contention is supported by a declaration of its actuary, James Winer.”

Mary complains that she filed an objection to the Winer declaration, but that the referee did not rule on it. By her failure to obtain a ruling on her objection, Mary has waived it. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1100.) We do not address Mary's challenges to the content of the Winer declaration.

(3) Ambiguity in Award

In addition to the foregoing, Mary contends that the pension award is voidable because it is ambiguous. She says the statement of decision "makes three different awards," and cites to several sentences of the statement of decision which she apparently believes to be inconsistent. We see no inconsistency and no ambiguity in the cited provisions.

(4) Notice of Adverse Interest

The statement of decision provides that, per Family Code section 755, the Plan is discharged from adverse claims with respect to payments made before the Plan received a 1999 notice of adverse interest. Mary disagrees. She says the 1989 QDRO put the Plan on notice of her claims and that the Plan "was also on notice on 10/26/94 when Mary requested recalculation per the 1992 Orders." (Capitalization omitted.) The 1989 QDRO did not put the Plan on notice of the claim for recalculation made only after the *Oddino* decision and after James retired. Furthermore, Mary does not explain the nature of any 10/26/94 notice and does not cite to any portion of the record containing a copy. Her argument concerning that notice is waived.

(5) Interest

The statement of decision provides that Mary's "benefit is the sum of \$131,462,87, plus \$18,575 representing interest accrued through January 1, 2000, plus simple interest on the sum of \$150,038.32 at the rate of 5% per annum (the rate

customarily utilized by the Plan for such calculations) from January 1, 2000 through the first day of the month preceding payment” Mary claims she is entitled to the payment of interest under Civil Code section 3287, subdivision (a), from October 1, 1994, the date of James’s retirement.

Civil Code section 3287, subdivision (a) provides: “Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, *except during such time as the debtor is prevented by law*, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor” (Italics added.)

Mary is not entitled to interest under this provision, because during the period of time for which Mary seeks interest, the Plan was prevented by law from paying the debt. The Plan was ordered to make payments pursuant to the 1989 QDRO and it did so. It did not have the authority to pay her a different, recalculated share of benefits without a new qualified domestic relations order to that effect. (See *Oddino, supra*, 16 Cal.4th at p. 71 [payment to former spouse requires qualified domestic relations order].)⁴

Despite the fact that *Oddino* apprised Mary of her right to seek a recalculation of benefit amounts owing following James’s retirement, Mary did not seek any such recalculation upon James’s retirement on October 1, 1994. In 1999, the Plan finally sent a letter addressed jointly to counsel for Mary and James, calling to their attention the fact that it had never received a QDRO ordering it to pay additional benefit

⁴ As stated in *Oddino*, “Under provisions of the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.; hereafter ERISA), private retirement plans may, pursuant to a state court’s domestic relations order, pay a portion of an employee participant’s retirement benefits directly to the employee’s former spouse or dependents, *if and only if* the state court order . . . is a ‘qualified domestic relations order’ (29 U.S.C. § 1065(d)(3).) [Fn. omitted; italics added.]” (*Oddino, supra*, 16 Cal.4th at p. 71.)

amounts based on the early retirement subsidy. It reminded the parties that the manner of the division of that benefit was “a matter of agreement between them and/or community property law.”

Once Mary, in 2000, sought a QDRO regarding recalculated benefits based on the early retirement subsidy, the amount of those benefits was subject to litigation. Without a QDRO dividing that additional benefit, the Plan had no legal authority to begin making payments to Mary which might jeopardize the share ultimately determined to be owing to James, or which might cause the Plan to ultimately pay benefits in an amount exceeding the total actuarial value of the aggregate benefits payable under the Plan.

Mary also seeks discretionary interest under Civil Code section 3288, which provides: “In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury.” Mary does not explain why this provision should be applicable, other than to state that “[u]nder the 1992 OSC orders, recalculated payments to pay her share of the ERB were due even before the Opening Brief was filed in the first appeal.” She provides no record references for the orders in question. Moreover, Mary did not file her order to show cause for “perfection” of the QDRO until March 23, 2000. Even were we to agree that section 3288 were applicable, we would have to hold that the court did not abuse its discretion in failing to award discretionary interest.

E. Trial Court Review of Referee’s Award

Mary argues that the court violated the Constitution by failing to review the decision of the referee. She asserts several bases for the argument, largely predicated on the notion that the reference was a section 639 reference, not a section 638 reference. We have already made clear that the reference was not a section 639 reference, so Mary’s arguments fail. The order for reference specifically stated that the referee’s “Statement of

Decision [would] stand as the decision of the Court pursuant to CCP § 644” There was no error.

F. Posttrial Orders

(1) Authority of referee

Mary filed a new trial motion, followed by an OSC requesting that the motion be heard by Judge Richard O. Frazee, Sr. Judge Frazee heard argument on her request and denied it. The new trial motion was heard and denied by Justice King.

Mary argues that it was error to order posttrial law and motion matters to be heard by the referee, for numerous reasons. Among those, she contends the order and reference make the rendition of the statement of decision the referee’s final act. We do not construe the order so narrowly. Rather, where posttrial proceedings are concerned, orders for reference should be interpreted liberally. (*Clark v. Rancho Santa Fe Assn.* (1989) 216 Cal.App.3d 606, 625, fn. 19.)

Moreover, as Mary herself points out, Code of Civil Procedure section 661 provides that new trial motions “shall be heard and determined by the judge who presided at the trial” This rule has been applied to section 638 referees. (*Clark v. Rancho Santa Fe Assn., supra*, 216 Cal.App.3d at pp. 623-625.) As stated in *Clark v. Rancho Santa Fe Assn., supra*, 216 Cal.App.3d at page 625, the referee “was the appropriate decision maker to determine the merits of the motion for new trial. He was most familiar with the facts and as well qualified as a sitting superior court judge to draw legal conclusions from those facts, such as the timeliness of the notice of intention to move for new trial, the grounds stated for new trial, and the proper standard of decision upon the petition.” (Fn. omitted.) This was particularly true in the complex and voluminous matter before us. In addition, we observe that Mary’s counsel, while having objected at

the outset of the hearing on the new trial motion to the matter being heard by the referee, nonetheless chose to participate in that hearing.

Justice King was the proper individual to hear the new trial motion. We need not address each of Mary's many arguments on this point. Suffice it to say, we find them lacking in merit.

(2) Other orders

Mary makes a multitude of arguments concerning a variety of additional posttrial orders. We need not address each of these arguments individually. They are repetitious, lacking in citation to authority or to the record, or otherwise meritless.

G. Attorney Fees

(1) 1992 Attorney Fee Request

Mary argues that it was error to fail to reconsider the 1992 denial of her attorney fee request. She claims the denial "became unjustified" when acts of the Plan to conceal reports and make false assertions were revealed. She provides no record references in support of her argument. It is waived.

(2) 2001 Attorney Fee Award/Sanctions

Because of Mary's dogged pursuit of matters that had already been resolved by the California Supreme Court, and because of her misleading statements to the court and unwarranted volumes of paperwork, the referee awarded attorney fees and costs to the Plan and to James. Mary was ordered to pay James \$60,000 in attorney fees and costs. In addition, she was ordered to pay \$100,000 in attorney fees and costs to the Plan, reduced as herein described. Pursuant to a 1998 tentative decision, the court had previously contemplated ordering the Plan to pay \$50,000 in attorney fees to Mary. The \$100,000 sum that Mary was ordered to pay under the SDRO was reduced by the

\$50,000 amount set forth in the tentative decision, such that the tentative decision became final and Mary was required to pay the Plan a net \$50,000.

The statement of decision cites Family Code sections 271 and 2030 in support of the awards. Family Code section 271, subdivision (a) answers it all. That section provides: “Notwithstanding any other provision of this code, the court may base an award of attorney’s fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction. . . .”

Mary contends that the referee abused his discretion by ignoring Family Code section 271. She clearly misunderstands. The referee did not ignore the section; he made use of it. The record speaks for itself. The referee’s comments as quoted in the introduction of this opinion aptly characterize Mary’s litigation tactics. He did not abuse his discretion in awarding fees under section 271.

Mary complains that the award would work a financial hardship on her, and also that the referee failed to consider the conduct of the opposition. The SDRO is carefully crafted to ensure that the fees Mary is ordered to pay are paid out of the retirement benefits owing to her. Thus, she is not required to come up with money out of pocket to pay the fees. As for the conduct of the opposition, we observe that both James and the Plan have responded professionally while being dragged through the court mercilessly for years.

In addition to arguing that the referee ignored Family Code section 271, Mary contends that he either ignored Family Code section 2030, or failed to exercise his discretion under it. Section 2030 permits the court to award attorney fees and costs in dissolution proceedings in order to ensure access to legal representation. Mary cannot

comprehend how it is either the Plan or James could require assistance with the payment of attorney fees and costs in order to have access to legal representation. We need not address this argument, since the record supports the awards under Family Code section 271.

Similarly, we need not address each and every one of Mary's many additional arguments concerning attorney fees and sanctions. Suffice it to say, they are variously lacking in citation to authority or to the record or are otherwise meritless.

(3) Cross-appeal re fees payable to Mary

The Plan states that it believes the net result of the fee awards, i.e., \$100,000 payable by Mary reduced by \$50,000 payable by the Plan, was well within the referee's discretion. However, the Plan filed a cross-appeal in order to preserve its right to argue fees dependent upon this court's inclination to rule. The Plan states: "If this Court determines that any portion of Justice King's award of the attorneys' fees to the Plan was beyond Justice King's discretion, the Plan requests that this Court also reconsider and reverse the attorneys' fees awarded to Mary." We agree with the Plan that the net fee award was within the referee's discretion.

(4) Attorney fees on appeal

James and the Plan have each requested attorney fees on appeal. We find that Mary has continued to exhibit her litigious propensities on appeal, despite the fair warning of the referee. She has continued to present untenable and unreasonable positions, largely unsupported by either accurate citations to the record or apposite legal authority. Her inexcusably voluminous paperwork has unfairly burdened both the court system and the other litigants. Accordingly, we grant the request to award attorney fees to both James and the Plan on appeal, pursuant to Family Code section 271.

III

DISPOSITION

The orders are affirmed. James and the Plan shall recover their attorney fees and costs on appeal. The matter is remanded to the trial court for a determination of the amount of attorney fees and costs.

MOORE, J.

WE CONCUR:

SILLS, P.J.

RYLAARSDAM, J.